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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/619,324	07/14/2003	Ernest H. Roberts	FLG-028USDIV	8027
23717	7590	09/14/2004	EXAMINER	
LAW OFFICES OF BRIAN S STEINBERGER 101 BREVARD AVENUE COCOA, FL 32922			VARNER, STEVE M	
			ART UNIT	PAPER NUMBER
			3635	

DATE MAILED: 09/14/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/619,324

Applicant(s)

ROBERTS ET AL. 

Examiner

Steve M Varner

Art Unit

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 14 July 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-39 is/are pending in the application.
- 4a) Of the above claim(s) 1-20 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 21-27, 29-34 and 36-38 is/are rejected.
- 7) ☒ Claim(s) 28, 35 and 39 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)             | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)    | Paper No(s)/Mail Date. _____  |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                                    |

## DETAILED ACTION

Claims 1-20 are cancelled.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 21-39 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 2, 4, of U.S. Patent No. 6779311, Roberts. Although the conflicting claims are not identical, they are not patentably distinct from each other because.

Regarding claims 21, 26, 31, 32, Roberts '311 claims 1, 2, 4, claim the claimed structure.

Regarding claim 22, the water irrigation head is not claimed; therefore, a microjet need not be found.

Regarding claim 23, 24, 29, 30, 33, since the water irrigation head is not claimed, relationships to it need not be found.

Regarding claim 25, the first button of claim 4, '311, is taken as the stake, and the band of claim 1, '311, is taken as the hose.

Regarding claim 27, pyrethoid of claim 2, '311, is an insecticide or pesticide according to Hawley's (Page 942).

Regarding claim 34, claim 1, '311, claims mounting the band about the surface. It is inherent that this mounting may support the sheet above the ground surface.

Regarding claim 36-38, '311 claims 1, 2, 4, claim the basic claimed structure without the water irrigation head. Water irrigation heads or spigots are well known in the art. It would have been obvious to one of ordinary skill in the art at the time the present invention was made to use a spigot with claims 1, 2, 4, '311, as the elongated longitudinal member that enters into a residence (see claim 1, '311) to provide water for gardening outside the residence.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 21-27 are rejected under 35 U.S.C. 102(b) as being anticipated by Carmen.

Regarding claim 21, 22, Carmen shows a flexible sheet (3), arthropod deterring component (6) (Col. 4, Line 7) associated with the sheet (Fig. 1, 4).

Regarding claim 23, Carmen shows an opening through the sheet (the tree (4) goes through this opening) (Fig. 1).

Regarding claim 24, Carmen shows a support member (2) (Fig. 4).

Regarding claim 25, Carmen shows a stake (7) and hose (2) (Col. 4, Line 30-35) assembly. (The cylindrical compressible material (2) forms a short length hose) (Fig. 4).

Regarding claim 26, 27, Carmen shows an arthropod deterring agent including a pesticide (6) (Col. 4, Line 5-10) (Fig. 4).

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 29-34, 36-38, are rejected under 35 U.S.C. 103(a) as being unpatentable over Carmen.

Regarding method claims 29-34, the claimed methods are the obvious methods of deterring crawling arthropods using Carmen's tree trunk barrier for pest control.

Regarding claim 36, Carmen shows a sheet (3). It is obvious that the sheet is between the top of the tree and the ground surface (Fig. 1). Carmen shows an arthropod deterring material (6) associated with the sheet (Fig. 1). Carmen does not show a water irrigation head. Water irrigation heads are well known in the art. It would have been obvious to one of ordinary skill in the art at the time the present invention

was made to use a water irrigation head as is known in the structure of Carmen to prevent arthropods from getting into the water supply.

Regarding claim 37, Carmen shows a gasket shape having a through-hole (hole which (2) circumscribes) (Fig. 1, 4).

Regarding claim 38, Carmen shows a pesticide (6) (Fig. 4).

### ***Claim Objections***

Claims 28, 35, 39, are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Manak shows a plastic tree band. Hand et al. reveals a method and apparatus for preventing crawling insects of other crawling pests from gaining access to plants. Long teaches surfaces coated with fluorocarbon resins upon which insects cannot climb or alight and methods and means for their establishment. Toutountzis et al. shows a termite barrier. Carmen teaches a tree trunk barrier for pest control. Heyek shows a conical squirrel baffle. Nylen et al. reveals a squirrel baffler.

### ***Conclusion***

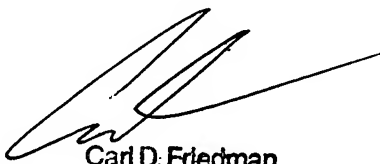
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steve M Varner whose telephone number is 703 308-1894. The examiner can normally be reached on M-F 7:30-4:30.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Carl D Friedman can be reached on 703 308-0839. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

SV 

  
Carl D. Friedman  
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